United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-4232

To be argued by
MARVIN DICKER

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MERCY COLLEGE,

Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF ON BEHALF OF RESPONDENT

PROSKAUER, ROSE, GOETZ & MENDELSOHN
Attorneys for Respondent
300 Park Avenue
New York, New York 10022
593-9000

Of Counsel:

MARVIN DICKER
SAUL G. KRAMER
LAURA E. DRAGER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

In the

United States Court of Appeals

FOR THE SECOND CIRCUIT

National Labor Relations Board,

Petitioner,

v.

Mercy College,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF ON BEHALF OF RESPONDENT

Statement of the Issues Presented

1. Did the National Labor Relations Board (the "Board") improperly allow the determinative ballot cast by Neil Judge, a supervisor, manager and administrator to be counted in the secret ballot representation election?

2. Did a material misrepresentation of the Middle States Association's Report made by the Union the day before the election destroy the laboratory conditions for the election?

3. Did the failure of the Regional Director to hold an evidentiary hearing with respect to disputed critical facts as to Neil Judge's status and the effects upon the misrepresentation objection constitute a violation of due process?

4. Was the Faculty Council (the petitioning labor organization) improperly listed by a grossly misleading name on the ballot and notice of election?

5. Is the order unenforceable because the Board violated its own statutorily mandated quorum requirement (29 U.S.C. § 153(b))?

6. Is it equitable to enforce the order in light of significant changes in circumstances at the College?

Statement of the Case

The Board has petitioned to enforce its order requiring Mercy College (the "College" or the "Employer") to recognize the Mercy College Faculty Council (the "Union") as the exclusive bargaining agent of a unit consisting of all full-time and regular part-time members of the faculty.

The issues before the Court arise *inter alia* out of a representation election held November 7 and 8, 1973. According to the Board, this election was valid and properly resulted in a Union victory by a certified vote of 42 to 41. As we shall demonstrate below, these conclusions are without merit for they represent a departure from settled precedents, are beyond the scope of the Board's authority under the Act and, in any event, are clearly erroneous.

More particularly, enforcement of the Board's order should be denied because:

1. The Board allowed the determinative ballot cast by Neil Judge, the College's Director of Athletics, to be counted, this despite the fact that (a) the Board *conceded* Judge to be an administrator and supervisor, and that (b) both administrators and supervisors were excluded from the unit by agreement of the parties and must, therefore, be excluded from the unit as a matter of law. (P. Br. 13,

17; A. 128-130)* The Board's ruling was premised on its conclusion that Judge acted as an administrator only 35% of his time. Without benefit of relevant citation—and contrary to the *Bell Aerospace* doctrine—the Board asserted that a 50% standard was somehow required. The Board also announced, contrary to the decisions of this Court, that a 50% test would be applied to Judge's admitted supervisory activities. Thus, the Board concluded, by fiat, that admitted supervisors, such as Judge, will not be excluded if they supervise non-unit employees less than 50% of the time.

The quantitative factual findings with respect to time engaged in administrative activities and the ruling with regard to the nature of Judge's supervision are contrary to the only evidence in the record. The 50% rule, as applied to administrative activities, ignores the explicit intention of the parties to the election as evidenced in their stipulated unit designation, is contrary to the *Bell Aerospace* doctrine and misconceives the law. To the extent that the decision is premised on a 50% test applied to supervisory activities, it represents an amendment to Section 2(11) of the Act that warps the plainly stated Congressional intent to exclude supervisors based on the disjunctive possession of various attributes of authority, rather than their exercise—and certainly without reference to any quantitative measure of that exercise either within or without the bargaining unit.

2. In what can reasonably be termed a failure to recognize the obvious, the Board refused to sustain an objection to a blatant misrepresentation of fact made by the Union in writing on the day before the election—an untruth about a report by the Middle States Association, the College's accrediting body, that concerned the most critical

---

* References to the Appendix are designated "A.". References to Petitioner's brief are designated "P.Br.".

issue in the campaign, namely, governance of the College. The misrepresentation, which even the Board *conceded* was a possible "half-truth" (P.Br. 22; A. 122), was so timed and of such importance that it must be found to have destroyed the laboratory conditions for the election if the *Hollywood Ceramics* doctrine is to have any meaning.

3. The Board, without conducting a hearing, apparently credited undisclosed evidence. A thorough search of the record fails to reveal any evidence supporting the Board's conclusions on highly factual issues, to wit: the Judge status challenge and the effect of the material misrepresentation. In addition, the inferences drawn by the Board from the admitted facts are contrary to the evidence in the record. Failing to hold a hearing under these conditions denied the Employer due process under the law.

4. The Board permitted the Union to call itself during the campaign and election by an abbreviated and misleading name, despite substantial evidence demonstrating that the Union was serving as a front for an AFL-CIO organization (NYSUT). Taking the incredible position that, in any event, either NYSUT or the Union could adequately represent the unit, the Board neglected its obligation to provide the voters with an election free of confusion, thus destroying the required laboratory conditions.

5. Although its violation of the Act only first came to light during the unfair labor practices proceeding (March 1975), the Board now admits to having violated the Section 3(b) quorum requirement of the Act in a decision made August 2, 1973. Moreover, the Board has failed to provide proof that it did not similarly violate the Act on two other occasions. Despite the significant and substantive impact of the August 1973 decision on the election, the Board believes it can rectify its violation of the statute,

which it brushes off as a mere "procedural infirmity", by a *nunc pro tunc* order. (A. 159) This flippant attitude must be rejected as it plainly flies in the face of the legislative direction and this Court's finding in the *KFC* case.

6. The election in issue here was held two and a half years ago. During that time significant changes in the composition of the unit and expansion of the College have occurred. Failure, at the very least, to order a new election will deprive well over half of the present members of the unit the opportunity to voice their votes. (A. 198, *et seq.*) In an election decided by one highly suspect vote, and which is otherwise clouded by several serious legal questions, equity compels a new vote.

Statement of the Facts

Pre-Election Proceedings

This proceeding started on May 4, 1973 when Bernard Koozman, a paid field representative of NYSUT,* filed a petition for an election with the Board on behalf of the Union. The petition listed the name of the Union as "Mercy College Faculty Council (Affiliation Pending—NYSUT-NEA/AFT-AFL-CIO)." (A. 58, 8-9) The filing of this petition had been preceeded by a demand for recognition addressed to the President of the College, and written on NYSUT stationery on April 30, 1973 by Mr. Koozman. (A. 60)

Although agreeable to a consent election, the Employer maintained at a Board held conference that the ballot should list the Union's name as it appeared on the petition. The Union, however, insisted it should be listed without the "affiliation pending" information. After impasse, the Union withdrew the May 4th petition and refiled a new

---

* New York State United Teachers—National Education Association/American Federation of Teachers—AFL-CIO.

petition the same day as the conference, May 17, 1973, under the name "Mercy College Faculty Council" and signed by Ann E. Grow, a faculty member and President of the Union. (A. 42; 4)

The College contested the use of the abbreviated misleading name, arguing that it was "calculated to deceive the voters at the election" by concealing the fact of the Faculty Council relationship with NYSUT. (A. 8-9) A subsequent hearing revealed that in addition to filing the May 4th petition, NYSUT supplied legal counsel prior to and at the hearing, organizing advice, authorization cards and NYSUT membership cards to the Union, all free of charge. (A. 30-33)*

Further, NYSUT representatives played an active role in formulating Union tactics. Thus, although the Union membership voted on April 18 and, again on May 9, 1973 to exclude part-time faculty from the unit, Ann Grow, solely on advice of NYSUT counsel, disregarded the membership's vote and sought to have part-time faculty included. (A. 40-42)

Despite this compelling evidence, the Acting Regional Director found in her Decision and Direction of Election, issued July 12, 1973, that the Union could be called by its abbreviated and misleading title. (A. 65)** The Employer filed a Request for Review of the Regional Director's

---

* Indeed, the NYSUT membership cards were distributed simultaneously with the authorization cards although the Union knew this was unnecessary. In a cover memo issued along with the cards, it simply informed its members not to return the NYSUT membership cards "as yet". (A. 56)

** Apparently the Regional Director relied heavily on the fact that the Union was purportedly organized prior to and without any assitance from NYSUT, and that it was designated as the "Mercy College Faculty Council" in its original By-Laws. (A. 64-65) While these events may have occurred prior to NYSUT's involvement with the Union, they can hardly be claimed to disprove the subsequent involvement of that AFL-CIO affiliate.

decision with respect to the Union's name. This request was denied on August 3, 1973 "By direction of the Board." (A. 69)

The Election

A secret ballot election was held on November 7 and 8, 1973. The balloting resulted in 42 votes for the Union and 41 against. The Board and the College challenged 3 voters; the College challenged 1 ballot (which was counted and included in the 42 "YES" votes) and filed six objections to the Union's pre-election conduct. (A. 71-74) The challenged ballot was eventually found invalid by the Board in its Decision on Review and Order, issued August 16, 1974, bringing the tally to 41 votes for the Union and 41 votes against the Union. (See *infra,* p. 10)

The Regional Director conducted an unusually long 16-week investigation of the issues raised by the challenges and objections. To the Employer's knowledge, the only evidence submitted during this investigatory period—indeed, the only evidence on the record—was provided by the Employer. Nonetheless, and without affording the Employer a hearing on several material factual issues which were found against the Employer, apparently on undisclosed evidence, the Regional Director issued a 31-page Supplemental Decision on March 7, 1974 in which he dismissed all the College's objections and directed that one of the challenged votes (Neil Judge) be counted. (A. 96, et seq.) That vote in favor of the Union brought the final tally to 42 votes for the Union and 41 votes against (see *infra,* p. 10). A tie vote would have resulted in no union being certified.

The Neil Judge Challenge

The challenged—decisive—voter was Neil Judge, Director of Athletics, who was excluded from the eligibility list and conceded by the Regional Director to be both an administrator and supervisor. (A. 128-130)

As Director of Athletics, Judge is responsible for the development of the College's intra and intermural athletic program. (A. 73) He administers his program under an administrative letter of appointment, identical to the agreement entered into by the officers and deans of the college, all of whom were excluded from the unit.* Similarly, Judge is paid as an administrator, prepares his department's budget, reports to an administrative dean, does not attend faculty meetings and is listed in the catalog exclusively as an administrator. (A. 93-95)

In addition to his administrative and managerial functions, Judge qualifies as a supervisor under the statutory definition as conceded by the Board. (P. Br. 17; A. 129-139) In particular, Judge hired John McMahon as the paid women's basketball coach, notifying the Dean of Student Life only after the fact. (A. 95) Furthermore, Judge enlisted the aid of an assistant coach for basketball and a tennis coach. (A. 95) He directs the work of all of those athletic coaches.

The Middle States Misrepresentation

The Employer also objected to a material misrepresentation in a leaflet distributed by the Union. On November 6, 1973, the day before the election, the Union placed a handbill in the mail boxes of voting unit employees that materially misrepresented a part of a report prepared in 1968 by the accrediting body for Mercy College, the Middle

---

* Administrator letters of appointment are terminable at will. Faculty members receive teaching contracts which run for a fixed term. (A. 91)

States Association of Colleges and Secondary Schools (hereinafter, "Middle States"). (A. 88-94)*

The first paragraph of the handbill claimed that the faculty provided the only stability to the institution, pointing out that there had been three changes of administration in the past several years and a 50% turnover in the Board of Trustees.**

The second paragraph of the handbill stated:

> "Also, many of us remember that outside accrediting agencies such as Middle States have given us fair warning that unchecked administrative authority will lead to rash and arbitrary decision making—*'authoritarian' was their word.*" (Emphasis added)

The third paragraph concluded that such arbitrary decision-making already exists. (A. 75-76)

Actually, the 27 page Middle States report found that the faculty at the College has a strong voice in determining the educational program and praised the Employer for such faculty involvement. Then as a suggestion to perpetuate these successes, the report suggested the creation of some form of faculty government to deter any possible development of an administrative "autocracy". (A. 80)

Moreover, the Union's leaflet failed to disclose that Middle States filed a follow-up report in February 1973 which stated not only that a viable faculty government had been established, but that the faculty and administration, working together, had raised faculty salaries to a competitive level. (A. 83, et seq.; 87)

---

* The Board claims the distribution may have been made November 5. However, the Board conceded the Employer would still have insufficient time within which to respond. (P. Br. 21, n. 18)

** The handbill failed to note that there had been a 50% turnover of faculty in the five years prior to 1973. (A. 89)

The Regional Director, although finding the Union chargeable with stating a "half-truth", did not consider the leaflet grounds for setting aside the election. (A. 121-122)

Board Review

The Employer sought to appeal the Regional Director's findings by submitting a Request for Review to the Board with regard to the eligibility of Neil Judge, the Union handbill and a third issue not now in contention. Further, in light of the Regional Director's reliance on unrevealed, secret "testimony", the Employer argued that an evidentiary hearing was required on the Judge and handbill-misrepresentation issues. On April 30, 1974, the Board denied the Employer's Request for Review with regard to these issues. (A. 133)

On April 23, 1974, the United States Supreme Court issued a decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), holding that "managerial" employees are not covered by the Act. In view of that decision, directly on point in this case, the Employer sought reconsideration by the Board of the Neil Judge challenge, but the Board rejected this request on May 13, 1974. (A. 134)

In a decision reached on August 16, 1974, the Board found a disputed ballot to be void (See, *supra,* p. 7). (A. 135, et seq.) At that point the tally stood at 41 "YES" votes, 41 "No" votes with the Judge vote still to be counted. On August 26, 1974, the Regional Director opened the challenged Judge ballot and issued a revised tally of 42 "YES" votes and 41 "No" votes. (A. 140)

The Quorum Requirement

During the course of the unfair labor practices proceeding, the Employer sought various documents essential in the preparation of its case, pursuant to the Freedom of Information Act (5 U.S.C. § 552). The requested documents included proof that the Board had not violated the

quorum requirement of the Act by having fewer than three members voting on the decisions reached August 2, 1973, April 30, 1974 and May 13, 1974. (A. 157-158)

In a telegram sent March 13, 1975, only after the Employer raised the quorum issue, the Board admitted that there was a possible "procedural infirmity" with respect to the Board's order of August 2, 1973. Therefore, a panel of three Members reviewed that decision and concluded the Request for Review should be denied *nunc pro tunc.* (A. 159)

Despite further requests by the Employer, the Board has yet to clarify what is meant by "procedural infirmity". Moreover, the Board has never provided adequate proof that the decisions of April 30, 1974 and May 13, 1974 were, indeed, free of "procedural infirmities". (A. 161-164; 169-171)

Apart from the documents concerning the quorum issue, the Employer requested documents used to support the Board's decisions on the issues raised in its Request for Review. Despite the fact that at no time has the Employer been able to confront those persons supplying evidence contradicting the evidence which it supplied, the Board continues to refuse to make this "evidence" available. (A. 153-154; 157-158; 159-160; 165-168; 181-184) *And, because it has not been made available, the so-called evidence has not been included in the record herein.*

ARGUMENT

POINT I

Neil Judge, an administrator, manager and supervisor, was ineligible to vote.

Where, as in this case, a representation election is decided by the vote of a single person excluded from the eligibility list, the evidence on the record should provide

substantial proof that this single challenged vote should be counted. Despite the Board's several attempts at obfuscation, the evidence here overwhelmingly—indeed, without contradiction—supports the finding that Neil Judge is a supervisor and managerial employee, properly counted among the College's administrative personnel, and must be excluded from the unit.

Judge, A Manager, Was Properly Excluded From The Unit As "Administrative Personnel".

In *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), the United States Supreme Court affirmed this Court's conclusion that *all* managerial employees must be excluded from coverage of the Act. An employee falls within the managerial exclusion if he meets either of two tests: (1) even if he is not a supervisor, he is so closely related to or aligned with management as to place the employee in a position of potential conflict between his employer and other employees; *or* (2) he formulates, determines and effectuates his employer's policies or has discretion, independent of the employer's established policy, in the performance of his duties. *Illinois State Journal-Register, Inc.* v. *NLRB*, 412 F.2d 37, 41 (7th Cir. 1969); *Retail Clerks Int'l Ass'n.* v. *NLRB*, 366 F.2d 642, 644-45 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967).

The Board's General Counsel correctly stated the holding of the *Bell Aerospace* decision to be "that Congress did not intend the exclusion of managerial employees to be limited to those in position susceptible to conflicts of interest in labor relations but rather that the exclusion embraced all managerial employees. 416 U.S. 274-275." (P. Br. 17-18) But the Board, although *conceding* that Judge spends 35% of his time on administrative duties, is apparently unwilling to apply the Court's ruling to this case. Under the rationale of *Bell Aerospace*, the question here *cannot* be—as the Board would have the Court be-

lieve—whether considering the "multifunctional" nature of Judge's position, the majority of his time is in fact spent exercising managerial duties (P. Br. 13; 18, fn. 16). Rather, the question is whether Judge evidences *any* managerial authority; if he does, he must be excluded from the unit.

As director and manager of the College's athletic program, Judge has sole responsibility for the development of intercollegiate and intramural sports. He makes all policy decisions for the College in this area. For instance, he has authority to enter into agreements with other colleges and he negotiated and committed the College to affiliate with an intercollegiate basketball league. (A. 93)

The uncontroverted evidence establishes that Judge "prepare(s) the budget for the Athletic Department, which he submits to the Dean for Student Services, who incorporates it into his budget to the College". (A. 93)* Using this budget, Judge has sole responsibility for buying equipment and procuring other departmental needs, including the hiring of coaches (see *infra,* p. 19).

In addition to these duties, the evidence establishes that Judge administers the athletic program under a twelve-month administrative letter of appointment, identical to the agreement entered into by the President, Treasurer, Deans and other administrative personnel, all of whom were excluded from the unit. He reports to the Dean for Student Services as do all other Directors who were ineligible to vote. Those within the unit report to the Dean for Academic Affairs. Judge is listed in the College's catalogs exclusively as an administrator.** He does not

---

* There is absolutely no support in the record for the Board's finding that a budget was "assigned" to Judge. (A. 128; P. Br. 19)

** The Board makes an issue of the fact that how one is listed in the catalog does not necessarily coincide with whether one is an ad-

(footnote continued on following page)

attend faculty meetings nor does he vote in faculty elections. He is paid in accordance with the administrative pay scale rather than the faculty scale. (A. 93-95)

This evidence convincingly establishes that Judge is a manager under the *Bell Aerospace* test. But, even if this were not so, as if to ward off any conceivable question on this point, the parties further stipulated to exclude all "administrative personnel" from the unit. (A. 65-66; 52) The stipulation assures that individuals sharing a community of interest as administrators, both with respect to their responsibilities to the College and their own conditions of employment, would not be grouped together with regular faculty members. Pursuant to this stipulation, Judge was excluded from the eligibility list.

Apparently, the only similarity between Judge's current functions and those of members of the bargaining unit is that he taught one 3-credit physical education course in the 1973 Fall semester under a part-time teaching contract.* Significantly, however, almost all the other conceded administrators have taught courses under part-time teaching contracts while carrying on their administra-

---

(footnote continued from preceding page)

ministrator for purposes of unit determination. In particular, the Board found department chairmen and deans listed under both faculty and administrative positions, but only deans were ineligible to vote. (P. Br. 13, n. 8) The Board, however, neglected to note that the parties to the election specifically agreed to include department chairmen in the unit. (A. 65) The Board further contends that Irving Koslowe, listed solely as an administrator, was allowed to vote. As explained during the investigation, Koslowe, Director of the Law Enforcement Program, shares a community of interest with the faculty as evidenced by various indicia other than how he is listed in the catalog. Moreover, it is the Board's own precedent which suggests that although not determinative in and of itself, catalog listing is one of several indicia to be considered. See, e.g., *Adelphi University,* 195 NLRB 639 (1973).

* The Board claims that Judge taught six hours during the Fall 1973 semester. (P. Br. 14) We know of no evidence in the record to substantiate this claim.

tive functions. (A. 94-95) None of these individuals were any less administrators for having taught at the College on a part-time basis; all but Judge were excluded from the unit.

Indeed, counsel for the Union specifically agreed at the June 15, 1973 Board hearing that all such multi-functional administrators were to be excluded from the unit:

> Hearing Officer: The parties stated that they agreed to exclude deans even if they are members of the faculty. Is that correct Mr. Sissman?
>
> Mr. Sissman: Yes.
>
> * * *
>
> Mr. Kramer: That would also apply to assistant deans, Mr. Hearing Officer, if they are members of the faculty.
>
> Mr. Sissman: *It would apply to all the excluded managerial and administrative personnel who happen to be members of the faculty.* (Emphasis added; A. 52)

Disregarding all this, the Board asserts that the multi-functional nature of his work makes Judge comparable to the athletic coaches at another college who were included in the unit.* This comparison, however, is inapposite, for the coaches at Manhattan College did not have any administrative responsibilities.** Indeed, where athletic coaches, irrespective of the amount of time they devote to teaching, are found to have a different line of reporting than other faculty members, they have been excluded from the unit. *Point Park College,* 209 NLRB 1064 (1974).

---

* *Manhattan College,* 195 NLRB 65 (1972).

** In the one other case cited in the General Counsel's brief, the Board itself relied heavily on the fact that the Director of Athletics voted at faculty meetings—which Judge does not (A. 94)—in determining that he should be included in the unit. *Florida Southern College,* 196 NLRB 888 (1972).

Significantly, the Board never denied that Judge is an administrator; the Regional Director found that Judge spent 35% of his time on administrative duties. (A. 128) But for some unexplained reason, the Board created a rule (apparently for the first time) that since Judge spent less than half his time as an administrator, he should not be excluded from the unit. Apart from the fact that there is no evidence in the record to support the Regional Director's finding, a careful, thorough review of the Board's decisions has failed to reveal a single instance where the Board previously applied a so-called 50% rule to administrative employees.

Apparently, the Board is determined to create a new, simplistic and conceptually unrealistic rule. Not only does the *Bell Aerospace* decision and the parties' own stipulation prohibit this, but the complex and ever-changing nature of most administrative and managerial work defy quantification or any mechanistic approach to status determination. When, as here, the employee in question concedly administers more than one third of his time in a role with conceded potential for growth in the administrative area, he must be excluded from the unit if the term "administrator" is to have any meaning.

For these reasons, there is no basis for the Board's argument that Judge's situation is comparable to that of faculty members in general who have, as such, been consistently refused managerial status by that agency. In each of the cases cited by the Board, the decision reflected only that the faculty *as a whole* could not be excluded from the unit; the Board then went on to exclude particular individuals as administrators.* In the case relied on most heavily by the Board, not only was the Director of Athletics spe-

---

* Petitioner's brief, pp. 18-19, citing *New York University,* 205 NLRB 4, 5 (1973); *Tusculum College,* 199 NLRB 28-30 (1972); *Adelphi University, supra,* 195 NLRB at 648 (1972); *Fordham University,* 193 NLRB 134, 135 (1971); *C. W. Post Center of Long Island University,* 189 NLRB 904, 905 (1971).

cifically excluded from the unit by the parties, but the Board itself excluded all employees who even arguably possessed managerial status. *NLRB* v. *Wentworth Institute,* 515 F.2d 550 (1st Cir. 1975).

If anything, Judge's situation at Mercy College duplicates that of the director of the instructional Media Center at Adelphi University. There, the Board concluded that although a part-time instructor, the Director was hired under an administrative-type contract; that she reported to the vice president of academic affairs (unlike regular faculty members); that with the vice president she prepared the center's budget; and that within budgetary limits she hired the center's part-time student employees. The Board concluded that the Director shared a "greater community of interest with the University's administrative personnel who were excluded by stipulation than with the teaching staff." 195 NLRB at pp. 644-645.

Plainly, a common sense approach to Judge's status requires a reversal even if the Regional Director correctly concluded that Judge was an administrator only 35% of his time. As we understand the record, however, the only evidence on Judge's duties was submitted by the College and it shows that Judge spends more than half his time performing administrative and managerial functions. (A. 93-95) Absent a hearing, only this evidence may be credited and the College's challenge to Judge's vote must be sustained.

Judge Is A Supervisor.

The legal precedents

In addition to his administrative functions, the Board concedes that Judge "did exercise some supervisory authority". (P. Br. 17) Application of the statutory definition of the term "supervisor" in the Act and that concession requires a finding that Judge be excluded from the unit.

The definition of "supervisor" is found in § 2(11) of the Act:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It is well established that the supervisory definition of § 2(11) must be read in the disjunctive and that an employee is a supervisor if he possesses authority to exercise *any* one of the powers set forth in that section. *NLRB* v. *Metropolitan Life Insurance Co.*, 405 F.2d 1169 (2d Cir. 1968); *Ohio Power Co.* v. *NLRB*, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949); *NLRB* v. *Edward G. Budd*, 169 F. 2d 571 (6th Cir. 1948), *cert. denied*, 335 U.S. 908 (1949). It is, moreover, the mere existence of supervisory authority, not the exercise of it, which gives rise to supervisory status. *Arizona Public Service Co.* v. *NLRB*, 453 F.2d 228 (9th Cir. 1971). The test is qualitative, not quantitative. The definition and the cases permit no other conclusion.

In maintaining that Judge is not a supervisor, the Board here seeks shelter in the doctrine that deference is owed to its expertise in applying statutory terms to particular facts. (P. Br. 15) The Board's discretion however is particularly narrow in determining whether an employee is a supervisor for "[t]he Act describes supervisors in detail, and the Board can only find as a matter of fact that the individual falls within or without the statutory definition." *NLRB* v. *Esquire, Inc.*, 222 F.2d 253, 257 (7th Cir. 1955). As the cases plainly show, the Courts of Appeals have not

hesitated to vacate the Board's findings that particular employees lack supervisory authority. See, *e.g., NLRB* v. *Metropolitan Life Insurance Co., supra; NLRB* v. *Roselon Southern, Inc.,* 382 F.2d 245 (6th Cir. 1967); *Warner Co.* v. *NLRB,* 365 F.2d 435 (3d Cir. 1966); *West Penn Power Co.* v. *NLRB,* 337 F.2d 993 (3d Cir. 1964); *Eastern Greyhound Lines* v. *NLRB,* 337 F.2d 84 (6th Cir. 1964); *NLRB* v. *Charley Toppino & Sons, Inc.,* 332 F.2d 85 (5th Cir. 1964); *NLRB* v. *Southern Airways Co.,* 290 F.2d 519 (5th Cir. 1961); *NLRB* v. *Fullerton Publishing Co.,* 283 F.2d 545 (9th Cir. 1960); *NLRB* v. *Leland-Gifford Co.,* 200 F.2d 620 (1st Cir. 1952); *Ohio Power Co.* v. *NLRB, supra.*

Judge's authority to "hire", "discharge" and "responsibly to direct"

As conceded by the Board, Judge has the authority to hire and fire. He hired John McMahon as a paid women's basketball coach in 1973. (A. 95) He also enlisted the aid of an assistant coach for basketball and a tennis coach. Because of present budgetary restrictions, and the infancy of the program, these two coaches serve in a voluntary capacity. However, as the program expands, additional paid coaches will be hired by Judge. Significantly, it is Judge who will decide how many coaches to hire, the amount of compensation they will receive, and whether they are to be fired. And as discussed above, it is also Judge who prepares and submits the budget which determines the number of and amount paid coaching positions. (A. 93)

The Board argues that Judge is not a supervisor because he does not effectively supervise Professor Ronald Rehbun, the tennis coach and a member of the unit. Furthermore, although conceding that Judge does supervise John McMahon and the assistant basketball coach, the Board contends Judge does not devote more than 50% of his time to supervising these non-unit employees and,

therefore, does not qualify as a supervisor. (P. Br. 16-17; A. 129-130)

First, Judge's supervision of the three coaches is sufficient to exclude him as a supervisor. Second, the evidence in the record simply does not support the Board's finding with respect to Rehbun. Third, the 50% rule enunciated by the Board constitutes an amendment of Section 2(11) and disregard of the numerous Court of Appeals decisions.

The leading case, *Ohio Power Co.* v. *NLRB, supra,* established that it is not the frequency of the exercise of supervisory duties, but the mere existence of the authority to exercise such power that is determinitive. In that case, employees who exercised supervisory duties only during emergencies were excluded from the unit. 176 F.2d at 388. See also *NLRB* v. *Florida Agricultural Supply Co.,* 328 F. 2d 989, 991 (5th Cir. 1964); *Arizona Public Service Co.* v. *NLRB, supra,* 453 F.2d at 231 (9th Cir. 1971).

Indeed, the Courts have gone even further noting that

> "* * * [O]nce an individual has actually been clothed with genuine power to perform a supervisory function, he thereupon becomes a 'supervisor,' even before an opportunity arises to exercise his power, and even though he may not often find it necessary to exert the power conferred. That is to say, one clothed with real power to discipline other employees, for instance, would be *ipso facto* a 'supervisor,' even though in a particular instance months, or perhaps in rare cases even years, might pass before any occasion ever arose calling for an exercise of the power." *NLRB* v. *Leland-Gifford Co., supra,* 200 F.2d at 625; *West Penn Power Co.* v. *NLRB, supra,* 337 F.2d at 997.

Plainly, Judge's authority exceeds these tests. The only evidence in the record is the uncontroverted statement that Judge directs and supervises the work of each of the three coaches, including the work performed by Rehbun, and has

the authority to fire them and obtain replacements (A. 93)* This proof necessitates the finding that Judge is a supervisor and must be excluded from the unit.

The 50% rule

Significantly, the Board concedes that Judge supervises McMahon and the assistant basketball coach, but contends that an employee must spend more than 50% of his working time in supervising non-unit employees in order to be held a supervisor. (P. Br. 17) We have searched in vain for statutory, legislative history or judicial support for such a rule. We find it all to the contrary .

The supervisory definition of §2(11) is met if an employee possesses the authority to exercise or effectively to recommend the exercise of any one of the section's enumerated powers. (See *supra*, p. 18) It has been uniformly ruled by the courts that it is the possession of supervisory authority, not the percentage of time spent in exercising that authority, that is determinative.

Thus, in *NLRB* v. *Fullerton Publishing Co., supra,* 283 F.2d at 550 (9th Cir. 1960), the court found an employee who worked both as an editor and as a reporter to be a supervisor, stating: "It is no help to the petitioner to urge that Fuller spent at least half of his time as a reporter, and only half of his time as a supervisor, for it is the existence of supervisory power, and not necessarily the constant and continuous utilization of it, which determines whether a man is a supervisor." See also, *West Penn Power Co.* v. *NLRB, supra; NLRB* v. *Roselon Southern, Inc., supra; Arizona Public Service Co.* v. *NLRB, supra.*

Nor is there any basis in the language of Section 2(11) or in its legislative history for a distinction between the

---

* Nor is Judge's responsibility limited to making work assignments in a routine fashion. (P. Br. 16, n. 12) Rather, he exercises the full complement of supervisory power as enumerated in the statute.

supervision of unit and non-unit employees. In fact, in *American Oil Company,* 155 NLRB 46 (1965), the Board itself excluded as supervisors several professional employees because of their supervision of non-professional, non-unit employees.

The Board's basis for the application of the 50% rule here is found in its own decision in *Adelphi University* where it held, *despite the numerous court decisions to the contrary* that:

> "* * * [A]n employee whose principal duties are of the same character as that of other bargaining unit employees should not be isolated from them solely because of a sporadic exercise of supervisory authority over non-unit personnel. No danger of conflict of interest within the unit is presented, nor does the infrequent exercise of supervisory authority so ally such an employee with management as to create a more generalized conflict of interest of the type envisioned by Congress in adopting Section 2(11) of the Act." *Adelphi University, supra,* 195 NLRB at 644. See also *New York University, supra,* 205 NLRB at 8. Cf. *Leland-Gifford Co., supra,* 200 F.2d at 625.

In reaching this conclusion, the Board apparently relied on *Westinghouse Electric Corp.,* 163 NLRB 723 (1967), *enf'd., Westinghouse Electric Corp.* v. *NLRB,* 424 F.2d 1151 (7th Cir. 1970). That case involved the supervisory status of professional engineers who, throughout the year, held two sharply separate positions, one supervisory and the other not. The time spent in the non-supervisory position was a measurable period of time not closely intermingled with the supervisory functions of the other position.

In the other position, the engineers supervised non-unit employees. There is nothing in either the Board or court decision that indicates that these engineers did in fact

spend 50% *of their time* in the actual supervision of non-unit employees. (Indeed, it may be inferred from the decisions that the engineers spent considerably less than 50% of their time supervising.) Rather, the Board based its determination of supervisory status on whether the engineers were assigned for more than 50% *of the year* in the supervisory position. This test, initially developed for seasonal employees, has no bearing on the amount of time an individual devotes to particular duties on a day to day basis. See *Greater Western Sugar Co.*, 137 NLRB 551 (1962).

The inconsistency of the Board's reasoning is apparent. Without more, the language of Section 2(11) mandates that the 50% rule as applied here cannot stand.

In any event, the underlying rationale of the 50% rule has been in essence overruled in the Supreme Court's *Bell Aerospace* decision which held that the Board could not limit the managerial exclusion to only those managers who were in a position susceptible to conflicts of interest.

In light of *Bell Aerospace's* undermining of the 50% rule's artificial "conflict of interest" rationale and of the Board's admission that Judge is a supervisor (A. 17; P. Br. 17), we urge the Court to reverse the Board's holding and find Judge excluded from the unit as a supervisor.

In sum, Judge possesses precisely the kinds of authority that not only legal precedent but the parties themselves intended to exclude from the unit. We urge this Court to reverse the Board's findings and exclude Judge from the unit as an administrator and supervisor.

POINT II

The misrepresentation of the Middle States Association's report by the petitioner destroyed the required laboratory conditions for the election.

Accreditation by an interscholastic association, such as the Middle States Association of Colleges and Secondary Schools, is a life or death matter for any institution of higher learning. Reports by such agencies are critical and accolades and criticisms contained in them are of paramount importance to the faculty and administration alike. Serious criticism of a college administration by such an agency will go a long way toward destroying the ability of that administration effectively to govern the institution.

On November 6, 1973, the day before the election, the Union placed a handbill in the mail boxes of voting unit employees that materially misrepresented a part of a five year old report prepared by Middle States, the accrediting body for the College. (See, *supra*, pp. 8-10)

Although conceding that the Union's clear distortion of the Middle States report was "possibly . . . a half truth" the Regional Director nonetheless refused to set aside the election. (A. 121-122) Given the heated campaign, the significance of the report to the institution and the faculty and the closeness of the election, this half truth must cause the election to be set aside.

As this Court noted in the *Bausch & Lomb* case, where it affirmed a Board order for a new election:

> "* * * [T]he Company's omission which resulted in its telling half a story—naturally that half most favorable to it—was indeed a half-truth and misstatement. This, (the Board) held violated the well-established

standard of *Hollywood Ceramics.*" *Bausch & Lomb, Inc.* v. *NLRB,* 451 F.2d 873, 876 (2d Cir. 1971)*

See also *NLRB* v. *Houston Chronicle Publishing Co.,* 300 F.2d 273, 279 (5th Cir. 1962) (Board found union's letter to contain a "half-truth"); *Celanese Corp. of America* v. *NLRB,* 279 F.2d 204, 206 (7th Cir. 1960), *remanded,* 365 U.S. 297, *reaff'd,* 291 F.2d 224 (7th Cir.), *cert. denied,* 368 U.S. 925 (1961) ("Characterizing the claim as a 'half-truth' does not confer upon it the veracity demanded in respect to material statements made immediately prior to a representation election.").

Middle States grants and reviews the accreditation of the College. Its reports are necessarily influential because all members of the unit are aware that decisions of the Association can make or break the College. To suggest it reported unfavorably when, in fact, the report praised the Administration, is the kind of half-truth that constitutes a material misrepresentation.**

The pernicious effect of the Union's use of the misquote is even more apparent in light of the supplementary report released by Middle States in February 1973, less than a year before the election, which not only failed to suggest the College's decline into an autocratic state, but praised the Administration's endeavors to improve faculty-administrative relations in accordance with the suggestions in the earlier report. (A. 83, et seq.; 87)

---

* The Court went on to note:

"We agree with the Board that it is irrelevant under the Hollywood Ceramics doctrine whether the Company's deception was accomplished by omission, and thus a half-truth, rather than through a specific misstatement." 451 F.2d at 876, n. 4.

** In a sense, the College's contention here is no different than the sense of outrage expressed by the Board when one of its own documents or rulings is used out of context. See *Natter Manufacturing Corp.,* 210 NLRB 118 (1974); *Jobbers Warehouse Service, Inc.,* 210 NLRB 1038 (1974).

Thus, contrary to the Board's position, there can be no doubt that there was a misrepresentation of the report. And, in light of the four-part test laid down in *Hollywood Ceramics,* 140 NLRB 221 (1962) (P. Br. 21, n. 18), this misrepresentation requires that the election be set aside:

1. Governance was *the* major campaign issue at the College. The false impression left on this subject created a highly material misrepresentation. See *Alco Standard Corp.,* 180 NLRB 412 (1969).

2. The Board concedes that the College "had no opportunity to reply" to the misrepresentation. (P. Br. 21, n. 18) See also *Graphic Arts Finishing Co.* v. *NLRB,* 380 F.2d 893, 896 (9th Cir. 1967); *Cross Baking Co.* v. *NLRB,* 453 F.2d 1346, 1350 (1st Cir. 1971); *NLRB* v. *Houston Chronicle Publishing Co., supra,* 300 F.2d at 279.

3. Members of the Union's leadership, which sponsored the misrepresentation, had special knowledge and were in an authoritative position to know the complete truth. These faculty members had been at the College longer than many other members of the unit; they were present when the first Middle States report was released and widely discussed. Over the years, they had been the most active faculty members in establishing new governance structures. Other members of the unit respected this expertise and would accept the leadership's interpretation of the Middle States report. (A. 89; 121)

In the final analysis, cases hold that the test is not whether the speaker had knowledge, but whether listeners would believe he had. *NLRB* v. *A. G. Pollard Co.,* 393 F.2d 239, 242 (1st Cir. 1968); *Bor-Ko Industries,* 181 NLRB 292, 293 (1970). Given the leadership role played by the members of the Union's leadership and their tenure at the College, other faculty members would naturally accept their representations.

4. Other members of the unit were unable to evaluate or to learn the truth of the representation on their own. About half the faculty in 1973 were not employed at Mercy College in 1968 when the first Report was issued. (A. 89) Insufficient time remained before the election for those people and others to check the quote themselves, especially since the pertinent part is buried well within a long document. Moreover, as this Court has noted, to "excuse a flat misrepresentation on the ground that the deceived party, having no reason to do so, could have investigated and learned the truth is contrary to both legal and ethical principles." *Henderson Trumbull Supply Corp.* v. *NLRB,* 501 F.2d 1224, 1230 (2d Cir. 1974) *citing Cross Baking Co.* v. *NLRB, supra,* 453 F.2d at 1349; *NLRB* v. *Millard Metal Service Center, Inc.,* 472 F.2d 647 (1st Cir. 1973).

Although it is true that the Board has been entrusted with discretion in determining the nature and extent of allowable pre-election propaganda (P. Br. 20), it is equally true that the courts are not reluctant to set aside a Board order where the facts do not support it. See *NLRB* v. *Millard Metal Service Center, Inc., supra; Lake Odessa Machine Products, Inc.* v. *NLRB,* 512 F.2d 762 (6th Cir. 1975); *Aircraft Radio Corp.* v. *NLRB,* 519 F.2d 590 (3d Cir. 1975); *LaCrescent Constant Care Center, Inc.* v. *NLRB,* 510 F.2d 1319 (8th Cir. 1975); *Thiem Industries, Inc.* v. *NLRB,* 489 F.2d 788 (9th Cir. 1973).

The mispresentation here meets the established Board standards found in *Hollywood Ceramics,* thus necessitating a new election. To hold otherwise would result in a critical, indeed arbitrary, departure from established precedent.

POINT III

At the very least, due process entitles the College to an evidentiary hearing on the Judge and misrepresentation issues.

The *only* evidence in the record on the Judge and misrepresentation issues was submitted by the Employer in affidavits sworn to by the President and Treasurer of the College. (A. 88, et seq.; 90 et seq.) With respect to Judge, this evidence establishes that (a) he spends a substantial amount of his time performing administrative and managerial duties for the College; (b) he supervises both bargaining unit and non-bargaining unit personnel; and (c) he spends a minimal amount of time teaching, with a classroom involvement equal to or less than that spent by other administrative and managerial personnel, all of whom were excluded from the unit. (A. 93-95)

To support a contrary conclusion, the Regional Director apparently obtained conflicting evidence from a source or sources not revealed to the College.

Due process of law demands, and the rules and regulations of the Board provide, that where substantial and material issues of fact relating to the validity of a representation election arise, a hearing must be held. *NLRB* v. *Bata Shoe Co.,* 377 F.2d 821, 825 (4th Cir.), *cert. denied,* 389 U.S. 917 (1967); *ILGWU* v. *NLRB,* 339 F.2d 116, 124-25 (2d Cir. 1964); *NLRB* v. *Southern Paper Box Co.,* 473 F.2d 208, 210-11 (8th Cir. 1973); 29 CFR § 102.69(d).

The General Counsel would have us believe that a hearing was unnecessary because the "evidence" gave rise to no credibility issue and that the Regional Director's decision "turned on the application of Board expertise to largely undisputed facts." (P. Br. 28) Indeed, the General Counsel stated that "the relevant factual contentions contained in (the) affidavits were not disputed by the Regional Director." (P. Br. 27, n. 21)

This incredulous statement is simply untrue. A review of his decision reveals that the Regional Director relied heavily on statements apparently submitted by Judge himself. Based on these statements, contrary to the statements submitted by the Employer, the Regional Director made findings as to how much time Judge spent at certain activities in determining whether he was an administrator or manager. This reliance is evidenced by such phrases as "Judge states," "he estimates" and "Judge labels" sprinkled throughout the Regional Director's findings. (A. 128-29)

In fact, rather than relying on the evidence submitted by the College, as the General Counsel contends, the Regional Director relied exclusively on the statements submitted by Judge, who voted for the Union, and by other Union advocates.*

We submit that the lack of a hearing deprived the College of an opportunity to discredit the contrary evidence purportedly given by Judge and the Union, through cross-examination or submission of additional evidence. *NLRB* v. *Ames,* 450 F.2d 1209 (9th Cir. 1971).

This case presents a classic example of where an adjudicative hearing is essential:

> "'Facts pertaining to the parties and their activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for [a trial type of hearing].'" (Davis, *The Requirement of a Trial-Type Hearing,* 70 Harv. L. Rev. 193, 199 (1956)

---

* The General Counsel is caught in an obvious web of contradiction in contending that a hearing was unnecessary because the Regional Director contested only the College's legal conclusions. (P. Br. 27-28) If this were so, it would have been completely unnecessary for the Regional Director to have "quoted" Judge.

as cited in *NLRB* v. *Smith Industries, Inc.*, 403 F.2d 889, 892 (5th Cir. 1968))

Cross-examination is of particular value where variables such as time and percentages are at issue. *U.S. Rubber Co.* v. *NLRB*, 373 F.2d 602 (5th Cir. 1967). How can the Board so surely rely on Judge's statement that he spends no time in the evening, on weekends or during the summer or other vacation periods on the administrative duties of his job? How can the nature, quality and time Judge spends supervising be determined? Surely not by relying on a partial voter's statement without the benefit of cross-examination.

Nor can the Board's decision on the misrepresentation issue withstand scrutiny. The Regional Director in admitting that the Union's misrepresentation of the Middle States report constituted a "half truth" admitted that the College established a prima facie case that the misrepresentation was material and could have the effect of changing the election results. (A. 121-122) Although here, unlike the Judge issue, the Regional Director apparently relied on the facts submitted by the College, a hearing is still required:

> "It is often the case that though the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment." *NLRB* v. *Smith Industries, Inc., supra*, 403 F.2d at 893 (5th Cir. 1968).

Furthermore, the closeness of the election—where one vote could have made the difference—adds additional force to the College's insistence for a hearing:

> "Conduct which could have affected only a few voters may not have any effect on the ultimate outcome of the

election in cases where the vote disparity is large, but the same conduct in a close election could be determinative." *NLRB* v. *Gooch Packing Co.*, 457 F.2d 361, 362 (5th Cir. 1972) See also, *NLRB* v. *Mr. Fine, Inc.*, 516 F.2d 60 (5th Cir. 1975).

While we agree with the General Counsel that a hearing may be avoided in certain instances, this can happen only when the Regional Director, assuming all the facts to be as the employer states, still cannot support the challenge. *NLRB* v. *Bata Shoe Co., supra,* 377 F.2d at 826; *NLRB* v. *Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 249 (5th Cir. 1964). Plainly, that was not done here. We submit that the Board's haphazard approach to the facts in this case cannot be condoned; a hearing must be granted. *Excelsior Laundry* v. *NLRB,* 409 F.2d 70 (10th Cir. 1968).

POINT IV

The Union's abbreviated name was misleading to the voters.

Despite substantial evidence in the record demonstrating that at the time of the election the Union was actively involved in a pending affiliation with NYSUT, the Board ruled that this material fact need not be disclosed to the voters and allowed the Union to call itself by an incomplete name. We contend that the Board erred in allowing the Union to conceal from the voters its planned affiliation with an AFL-CIO organization, when the Union acknowledged by its own petition that this information formed part of its name and its attorney admitted that affiliation was "pending". (A. 58; 9)

The issue before the Court is one of first impression but Board cases give some insight into the proper resolution of this issue. Recognizing that it directs what names are used on the ballots, the Board itself has noted that it

must "decide whether a particular name, used to designate a union, confuses or would tend to confuse the employees in their free choice of a bargaining representative." *Radio Corp. of America,* 89 NLRB 699, 702 (1950).

The Board has applied this rule to require a union to use a different name in situations far less confusing than here. Thus, in *Paragon Die Casting Co.,* 57 NLRB 1 (1944), the Board refused to allow the A.F.L. to be designated on the ballot as "A.F. of L." Similarly, in *Certain-Teed Products Corp.,* 49 NLRB 360 (1943), the Board ordered a new election when the union appeared on the ballot as "Brotherhood of Railway Trainmen" instead of as "Brotherhood of Railroad Trainmen."

Given these cases, the Court must reverse the Board's decision on this issue. The "mis-designations" in the above cases are not nearly so damaging as the thinly veiled attempt by the Faculty Council to avoid AFL-CIO taint in the context of an election in a faculty unit. As the facts demonstrate (*supra,* pp. 5-6), the Union was attempting to deceive the voters into believing that they would be represented by an independent local organization, rather than merely one part of a larger AFL-CIO union. Indeed, the proof plainly shows that these organizations, the Union and NYSUT, had consummated that affiliation on a *de facto* basis.

The Union conceded that the "affiliation remains . . . pending" and that there was and is "an affiliation". (A. 9-10) NYSUT paid for the Union's counsel. As Dr. Grow, president of the Faculty Council, testified, if it had remained unaffiliated the Council would have paid for its own lawyer. (A. 31-33; 43) The initial demand for recognition was made by a paid field representative of NYSUT on the letterhead of NYSUT. In the petition filed with the Board on May 4, 1973, this "field representative," Bernard Koozman, styled himself as a field representative

of Mercy College Faculty Council (Affiliation Pending—NYSUT—NEA/AFT-AFL-CIO)." (A. 60) At no time has that pending affiliation been denied by NYSUT.*

Furthermore, Koozman, who worked for and was paid by NYSUT, advised the Union concerning its strategy, tactics and affiliation, and his May 4th petition was filed based on these discussions and assented to by the Union's leadership. (A. 35-39)**

Finally, the evidence shows that under the aegis of NYSUT's counsel, those representatives of the Union who attended the May 17 Board conference and the June hearings were led to include part-time faculty members in the bargaining unit. (A. 41-42) In so doing, they acted contrary to the resolution of the membership of the Union, a resolution that was binding on the Union and its representatives who attended the conference and the hearing. (A. 22-23; 40-41)

The General Counsel argues, in answer to the above evidence, that "the Union had been independently formed and was using the same name by which it had always been known." (P. Br. 22) This analysis is simplistic. Even if the Union was independent when formed, it could no longer so claim during the campaign and election; by that time, NYSUT was calling the shots. Plainly, this was a substantive reality that could not be ignored. See *Mack Mfg. Corp.*, 107 NLRB 209, 211-12 (1953); *Magnavox Co.*, 97

---

* Dr. Grow testified that Mr. Koozman filed the first petition only because the Union thought this was the necessary procedure. (A. 18-19) Curiously, at no time did Mr. Koozman relieve the Union of this misapprehension.

** The Board claims that since Dr. Grow informed the faculty in a memorandum released after the filing of the petition that no affiliation was pending, the voters could not have been confused. (P. Br. 23) But the Board misstated the facts; the memorandum was issued prior to the filing of the petition by Mr. Koozman thus leaving the door open for substantial confusion.

NLRB 1111, 1112-13 (1952), *enf'd., Magnavox Co. of Tenn.* v. *NLRB*, 211 F.2d 132 (6th Cir. 1954).*

Even more incredible is the General Counsel's contention that because either NYSUT or the Faculty Council would be qualified to represent the employees, it hardly matters which one does so. (P. Br. 24) We submit it matters very much to the employees voting in the election who may, we suspect, reject representation by NYSUT.

In these circumstances, by allowing the Union to be listed on the ballot without its pending affiliation, the Board caused a deception on the participants of the election which destroyed the laboratory conditions for the voting.

POINT V

The Board's conceded violation of the Act's quorum requirement demands that a new election be held.

The record amply demonstrates—indeed the Board concedes—that it violated Section 3(b) of the Act and the holding of this Court in *KFC National Management Corp.* v. *NLRB*, 497 F.2d 298 (2d Cir. 1974). In light of this egregious violation, the Board's order cannot be enforced.

Section 3(b) of the Act provides in relevant part:

> "The Board is authorized to delegate to any group of three or more members any or all powers which it may itself exercise."

Despite this plain statutory language, the Board, as a matter of practice, permitted representation election decisions to be made by one Board member and two staff

---

* We note in passing that the General Counsel's reference to cases where the Board rejects the argument that a Union is unfit to represent the employees is inapposite (P. Br. 23-4; *Alto Plastics Manufacturing Corp.*, 136 NLRB 850 (1962)). The College does not oppose the Union's right to an election; rather it simply objects to the failure to disclose in the Government's own official ballot the material fact of the pending affiliation, a fact plainly stated by the Faculty Council itself in the petition that was filed May 4, 1973.

attorneys. This practice was judicially prohibited by this Court when it found that:

> "So long as the Board's statutory basis and its own regulations provide for Board review of the Regional Director's decisions . . . it is the legally appointed and approved Board members, and not their staff assistants, who must make the final decisions on whether or not to grant review." *KFC National Management Corp.* v. *NLRB, supra,* 497 F.2d at 306-07.

The College raised the quorum requirement issue with respect to three rulings made by the Board on the underlying representation case. (A. 157-158)

We note at the outset that the Board admitted in a telegraphic order dated March 12, 1975 that its decision of August 2, 1973, the first of the three rulings in issue, may have been subject to a "procedural infirmity." Without detailing the infirmity, the Board sought to correct the one and a half year old decision *nunc pro tunc.* (A. 159)

Assuming the infirmity was failure to comply with the quorum requirement, a *nunc pro tunc* order at this late date is inapposite. The *nunc pro tunc* doctrine may be appropriate when the Board merely seeks to correct a clerical error (e.g., failure to properly record an order). But it is plainly inappropriate where the Board seeks to resolve a substantive issue anew.

The August 2, 1973 decision had the effect of establishing the ground rules of the election held that fall. It is thus beyond credence to expect the Board's *nunc pro tunc* ruling in 1975 to have any meaning other than the mere chimera of procedural propriety. The Board's action does not satisfy the legislative intent.*

---

* Nor can the Board's action be supported by this Court's ruling in *NLRB* v. *Newton-New Haven Co.,* 506 F.2d 1035 (2d Cir. 1974). That case held only that a party could not raise a question of administrative procedure for the first time before the court. Obviously, that is not the case here.

Apart from the 1973 d[illegible] there is reason to believe the Board d[illegible] not comply [illegible] the quorum requirement in reaching its decisions on April 30, 1974 and May 13, 1974. A comparison of the docket cards for all three rulings shows that the question of a procedural infirmity for the August 2, 1973 ruling arose as a result of the underscoring of Member Fanning's name on the docket card. A study of the supplemental docket card indicates a similar underscoring of Member Jenkins' name next to the April 30, 1974 decision. (A. 164, 171)

The Board's Executive Secretary contended that the Board voluntarily revised its procedures in the latter part of 1973 to assure review by three members. (A. 155) But the evidence of the docket cards raises serious questions as to whether the Board's supposed new policy was, in fact, operative in the spring of 1974. Rather, we believe that the new policy did not go into effect until after this Court's *KFC* decision in October 1974, well after all the decisions were reached in the underlying representation case.

Despite the Employer's repeated requests (A. 159-160; 165-168; 181-184), the Board failed to supply any proof of its compliance with the quorum requirement. In light of this intransigence, and given the resulting unanswered questions, the only conclusion one can draw is that the Board failed to comply with the statutory quorum requirement and, therefore, its order must now be found unenforceable.

POINT VI

Expansion of the unit, the closeness of the election and resulting serious legal issues necessitate, at the very least, a new election.

Significant expansion and turnover in the unit since the election two-and-a-half years [illegible] necessitate that enforcement of the order be denied [illegible] a new election held.

Specifically, since November 1973, the College has undergone substantial expansion that has affected its every part, including the unit in issue. Three extension centers have opened and a coordinate MBA program has begun. Many new faculty members have been hired resulting in an expansion of the unit from 85 eligible voters in 1973 to 137 voters today.

Concomitant with the expansion, there has been a sizable turnover of personnel in the original unit. Only 59 persons eligible to vote in the 1973 election would still be eligible to vote in an election held today. Thus, unless a new election is ordered, 78 people—well over half of the present unit—will effectively be deprived of their guaranteed right to select their bargaining representative.

Moreover, the form of expansion undergone by the College dramatically affected the composition of the unit. Many of the faculty hired to staff the extension centers and MBA program are part-time employees. Thus, whereas in 1973 the unit consisted of 59 full-time and 26 part-time employees, it now consists of 66 full-time and 71 part-time employees.*

The significance of the substantial change in the composition of the unit is magnified by the closeness of the election—a one vote difference.

Contrary to the Board's implication, the Employer is not seeking here to delay an inevitable duty to bargain. (P. Br. p. 29)** Nor is the situation here comparable to

---

* These statistics were supplied to the Board during the unfair labor practices proceeding. (A. 199-201)

** The Board's contention that the Employer is raising "defenses" previously litigated is misleading. The Employer is within its right to seek court review of issues it believes were incorrectly resolved by the Board. Two of the issues now being raised were only first presented during the unfair labor practices proceeding.

(footnote continued on following page)

the cases cited in the Board's brief where an employer, with "unclean hands" seeks a new election. Cf. *Franks Bros.* v. *NLRB*, 321 U.S. 702 (1944) (employer disrupted the election); *NLRB* v. *Katz*, 369 U.S. 736 (1962) (employer obligated by existing collective bargaining agreement).

Rather, the Employer is suggesting an equitable resolution that not only eliminates the many serious legal issues that would otherwise always cast a shadow over the bargaining relationship, to wit: an opportunity for *all* members of the unit ultimately to voice their preference by means of a new secret ballot election.

The ordering of a new election in situations comparable to the one at Mercy College is supported by Board precedent. See *Thomas Engine Corp.*, 179 NLRB 1029 (1970), *enf'd., Auto Workers* v. *NLRB*, 442 F.2d 1180 (9th Cir. 1971) (Election set aside after 20-month lapse and a substantial turnover of employees); *United Transports, Inc.*, 107 NLRB 1150 (1954) (Employer's reorganization with resulting changes in job assignments and a lapse of 13 months gave rise to the need for a new election).

Although we recognize this Court's reluctance to order a new election for changed circumstances,* precedent supports consideration of such an order in certain situations. See *NLRB* v. *Hood, Inc.*, 496 F.2d 515 (1st Cir. 1974). We believe the circumstances here are sufficiently unique that a new election should be ordered. In light of the significant

---

(footnote continued from preceding page)

Furthermore, that the Employer is not merely seeking delay is evidenced by the fact that of six objections originally filed, the Employer appealed only one of them when the Regional Director's investigation proved the others to be without merit. Further, the Employer sought no adjournments from the date of certification, August 30, 1974, to the date the Board filed in this Court to enforce its order, October 28, 1975.

* *NLRB* v. *Patent Trader, Inc.*, 426 F.2d 791 (2d Cir. 1970).

expansion in the unit since the election held over two years ago, the closeness of the election and the existence of serious legal issues arising out of the election, at the very least the Board's order must be set aside and a new election held.

CONCLUSION

For the reasons set forth above, enforcement of the Board's order should be denied and (1) the certification of August 30, 1974 should be vacated and "no union" certified in its place, or, in the alternative (2) a new election should be ordered, or, in the alternative (3) the case should be remanded to the Board for an evidentiary hearing.

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for Respondent

Of Counsel:

MARVIN DICKER
SAUL G. KRAMER
LAURA E. DRAGER

April 7, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MERCY COLLEGE,

Respondent.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 7th day of April, 1976, he served three copies of the on Elliott Moore, Esq. Deputy Associate General Counsel

the attorney for the Petitioner by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. 1717 Pennsylvania Avenue, Washington, D.C. ~~xxxx~~ ~~xxxx~~ ~~xxxxx~~ that being the address designated by him for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this

7th day of April, 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978